HASMAH BINTI OMAR v. ABDUL JALIL

[O. C. J. (Smith J.) November 7, 1957]

[Seremban — Civil Suit No. 64 of 1956]

Malay Customary Law — Adat Perpateh — Divorce — Claim for share of Charian-laki-bini property — Late declaration of Harta Pembawak — Wife's refusal to follow husband.

In this case a divorced wife claimed for half share of her husband's land and certain property according to the *Adat Perpateh* because the property was their *charian-laki-bini.* The husband resisted the claim for various reasons, partly of customary law and claimed to set-off a half share in certain property retained by the wife. The couple were married in 1950 and at the time of the marriage the husband made no declaration of *harta pembawak.* In 1951 the plaintiff bought a second-hand car for about $2.500 and a year later this car was part-exchanged for a new car which was used by the defendant for his business as a taxi-driver up to the time of the divorce. During the marriage two pieces of land were bought in the name of the husband and a third piece of land was applied for and was held on Approved Application in the wife's name. The husband divorced the wife on November, 1955. Other facts alleged by the parties were practically all mutually disputed.

Held: (1) the plaintiff was entitled to the transfer of the half-share in the lands provided she was not thereby receiving too much;

(2) in the circumstances of the case since the plaintiff had to account for a greater sum than the defendant no sum was due to the plaintiff from the defendant.

Semble: (1) according to the *Adat* it is possible to make a late declaration of *harta pembawak;*

(2) the custom in Kuala Pilah is different from that of Rembau. According to the *Adat* in Kuala Pilah proceedings to recover land can be commenced after divorce;

(3) a wife can refuse to leave the ancestral land if the land to which she is asked to remove has not been registered in her name.

Case referred to:—

(1) *Jasin v. Taiwan* (1941) M.L.J. 247.

CIVIL SUIT.

Parties in person.

Smith J.: — This suit concerns the claim of a divorced wife for half share of her husband's land and certain property according to the *Adat Perpateh* because the property was their *charian-laki-bini.* The husband resists the claim for various reasons, partly of customary law and to set-off a half share in certain property retained by the wife.

The undisputed facts are that the young couple married in April 1950 when the defendant (the husband) was about twenty years old. At the time of the marriage the husband made no declaration of *harta pembawak.* In 1951 the plaintiff bought a second-hand car for about $2,500. This car was part-exchanged for a new car a year later. This second car was used by the defendant for his business as a taxi-driver up to the time of the divorce. During the marriage two pieces of land were bought in the name of the husband, one in Mukim Juasseh and the other in Mukim Ulu Muar. A third piece of land was applied for in Mukim Juasseh and is held on Approved Application in the wife's name. The husband divorced the wife on 2nd November, 1955.

Other facts alleged by the parties are practically all mutually disputed. The husband alleged that although he made no declaration of *harta pembawak* he did in fact bring to the marriage his savings from before the marriage amounting to the sum of $2,500. This sum he said he subsequently declared before the family. It was not disputed that according to the *adat* it is possible to make a late declaration. The plaintiff and one of her witnesses whom the defendant alleged to have been present at this declaration were challenged to swear oaths that no declaration of *harta pembawak* was made by the plaintiff in their presence. The challenge was accepted by oath but when the time came to take the oath both declined. The plaintiff volunteered as her reason that she was prepared to swear only that the defendant had not made a declaration of *harta pembawak* of $2,300. Her witness volunteered as his reason that he thought he had to swear that the defendant had not made a declaration of *harta pembawak* of $2,600. Since these witnesses declined to swear that no declaration had been made I am satisfied that the defendant made some such declaration and I accordingly accept that he brought to the marriage the sum of $2,500 as *harta pembawak.*

The defendant claimed that the land bought during the marriage was bought with money lent to him by his grandmother (D.W.5). In proof of this the grandmother produced a most dubious document, Exhibit D9, in which the defendant acknowledged his debt. I am convinced that this document, executed four years after the alleged loan and after the dispute between the husband and wife had started, was prepared with possible civil proceedings in view. I therefore rejected the evidence of the defendant and his grandmother on this point and find that the two plots of land were *harta charian laki bini.*

With regard to the third piece of land held on Approved Application I accept that the land costs $1,196 to develop but do not accept that any of this money was advanced by the defendant's grandmother whose evidence I totally reject.

With regard to the motor car (a Morris-Oxford) I accept the defendant's statement that he paid $5,680 for it in 1952 and sold it for $2,200 in 1956. I do not accept his estimate that at the time of the divorce on 2nd November, 1955, it was only worth the latter amount in view of the fact that in August, 1955 the

car had been overhauled at a cost of $1,000. I assess the value of the car at the date of the divorce as $3,500.

As to the value of the dwelling house, almeirah and bed removed by the plaintiff I accept the defendant's figures in default of any evidence by the plaintiff other than her estimate.

I am satisfied that a buffalo was bought by the defendant with a Co-operative Society loan but that was in 1952. The plaintiff has not satisfied me that the buffalo referred to in her claim was alive at the time of the divorce.

With regard to the savings in the Post Office I accept the defendant's story that he spent the balance on his illness and repairing the car.

Turning to the counterclaim I have dealt with the land held on Approved Application (para. 6 of defence). I am not satisfied that at the date of the divorce the plaintiff was in possession of any jewellery given to her by the defendant. Had that been the case I would have expected him to demand his share then. It must be remembered that the defendant appears to have made no claim against the plaintiff until this suit was brought. His delay casts suspicion on his claim.

The radio is admitted still to be in the plaintiff's possession.

I am not satisfied that any poultry was alive at the date of the divorce. It is merely the defendant's word against the plaintiff. D.W.6 Zainal gave no evidence about seeing chickens at the house.

So far as miscellaneous items are concerned I can only accept as being in the plaintiff's possession at the time of the divorce those items which she admits, viz :—

Radio value	$405
Almeirah	38
Crockery	6
Loudspeaker	5

These total $454.

I now come to apply *adat* to the facts. The parties were both unrepresented and called elders of the tribe to give evidence as to *adat*. The evidence was generally in agreement.

I consider it is necessary that I distinguish this case from that of *Jasin v. Taiwan*[1] in which Horne J. held that claims to *charian laki bini* must be brought at the time of the divorce and that therefore in the absence of agreement or misrepresentation at the time the wife could not succeed in her claim to the land after the divorce.

In that case the divorced wife brought a claim to half of her husband's land nine years after the divorce. In this case the wife was divorced on 2nd November, 1955 and commenced these proceedings on 30th August, 1956. The point was not taken by the defendant in this suit that the divorced wife should have made her claim at the date of the divorce. I assume that the custom of Kuala Pilah is different from that of Rembau which was followed by Horne, J. and that according to the *adat* in Kuala Pilah proceedings to recover land can be commenced after divorce. A witness for the wife said that on divorce the wife's relatives decide what shall happen to the property and that if the relatives refuse or are not asked to do so a *lembaga* must decide. The custom of the wife's tribe therefore appears to be that if there can be no mutual agreement as to how the property shall be divided it shall be referred to a *lembaga* for arbitration. In this case that was not done but the wife went to the Court. She appears to me to have applied within a reasonable period.

I have accepted that the husband brought to the marriage the sum of $2,500 as *harta pembawak* which he used to purchase the car. Both parties agree that that *harta pembawak* is a first charge on the joint property when the *harta charian laki bini* comes to be divided.

The two pieces of land purchased were, I am satisfied, purchased out of money saved by the defendant during the marriage and the plaintiff is entitled to her share in them as *harta charian laki bini*. The husband is entitled to a half share in the land held on Approved Application. I accept that $1,196 was spent in developing this land but I do not accept that the defendant borrowed any money from his grandmother for the purpose. The defendant is therefore entitled to his half share in the money spent developing the land.

There was some conflict of expert opinion with regard to the *adat* concerning the wife who refuses to follow her husband. The defendant's expert witness insisted that the wife must always obey and follow the husband and if she does not she forfeits her share in the *harta charian laki bini*. The wife's expert said that a wife can refuse to leave the ancestral land if the land to which she is asked to remove has not been registered in her name. This latter opinion appears to me to be far more in keeping with the general spirit of the matriarchal system and I accept it.

The plaintiff prays that the defendant be ordered to execute a transfer of half-shares in the two pieces of land held under EMR and also a half-share in the motor car. The latter she cannot have since the defendant has sold it. She is entitled to the transfer of the half-shares in the lands provided that she is not thereby receiving too much.

On 2nd November, 1955, the defendant had, in addition to the land held under EMR, the following property :—

Car value	$3,500
Dwelling house	430
Almeirah	28
Bed	22
Total :	$3,980

Against this property worth $3,980 he was entitled to set off the $2,500 *harta pembawak* leaving a sum of account.

The plaintiff has to account for the following :—

(a)	Land held under Approved Application, value of development	$1,196
(b)	Radio	405
(c)	Almeirah	38
(d)	Crockery	6
(e)	Loudspeaker	5
	Total :	$1,650

Since the plaintiff has to account for a greater sum than the defendant no sum is due to the plaintiff from the defendant. The defendant has not counterclaimed for any excess (which in any event would only be $85).

I do therefore give judgment for the plaintiff in the terms of her first and second prayer and order that the time within which the defendant do execute the transfers be extended to 21 days.

I do also award to the plaintiff her taxed costs of this suit.

Order accordingly.

OSMAN BIN ABDULLAH v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Whyatt C.J. (S) and Rigby J.) April 9, 1957]

[Penang — F.M. Criminal Appeal No. 52 of 1956]

Penal Code, ss. 34 & 302 — Murder — Prosecution invoking aid of s. 34 without framing charge thereunder — Whether failure of justice — Criminal Procedure Code (Cap. 6) ss. 152, 153, 154 and 422 — Courts Ordinance, 1948, s. 29(1).

The appellant in this case was convicted on the following charge: "That you on the 27th day of May, 1956, at about 7.00 p.m. at Feeder 14, Sanglang, in the District of Kubang Pasu, in the State of Kedah, committed murder by causing the death of one Inin s/o Endin Kelai and you thereby committed an offence punishable under section 302 of the Penal Code."

The case for the prosecution was that the appellant, the deceased and one Hashim all lived in the same village on the banks of an irrigation canal. On the evening in question the deceased left his house to go to a nearby shop. Some time later shouts were heard from him and a sound which was described as "pok" and he was found sitting on the canal bund suffering from a head injury. In reply to questions as to who had injured him he named the appellant and Hashim. Immediately after the sound "pok" was heard and immediately before the deceased was found injured one Othman bin Din had seen the appellant and Hashim running on the bund and immediately afterwards saw the deceased lying on the ground. The deceased died later in the evening and on subsequent medical examination was found to have died from a fracture of the skull and intracranial haemorrhage caused by a blow with a heavy instrument. Later in the evening the appellant was arrested at his own house, but Hashim could not be found up to the time of trial. In the circumstances the prosecution were forced to rely on section 34 of the Penal Code. The defence was one of *alibi*, corroborated by the evidence of his father-in-law, a friend and his wife.

The assessors disagreed, but the trial Judge announced that he agreed with the one who believed the prosecution witnesses.

On appeal the conviction was attacked on a number of grounds, two of which the Court was of opinion called for consideration. One was that the learned trial Judge dealt with the question of common intention insufficiently and incorrectly and the other was that the prosecution having invoked the aid of section 34 of the Penal Code the charge should have been framed under that section and that failure to do so was a vital defect in the proceedings.

Held: (1) where the prosecution are proposing to invoke the section the charge should make this clear to the accused. In a case of murder, for example, the interests of justice clearly require that the accused person should know whether the case against him is that he himself struck the fatal blow or whether it is that some other person struck the fatal blow but that he was acting at the same time together with that other person and that the fatal blow was struck in furtherance of an intention which was common to them both. If this be not made clear the particulars stated in the charge "do not give the accused sufficient notice of the matter with which he is charged";

(2) in this case the charge erred against this principle. It simply stated that the accused committed murder by causing the death of the deceased. In itself it did not make it clear, or even suggest, that what it was proposed to prove against the accused was not that he struck the blow that caused the death of the deceased but that he and Hashim were acting together with a common intention to kill the deceased and that in furtherance of that common intention one or the other of them struck the fatal blow;

(3) however, in this case, it was clear that from the beginning in spite of the error in the charge the appellant knew perfectly well what the case for the prosecution was going to be and what in fact it was. In the circumstances it would be very difficult to say that the error in the charge as such occasioned a failure of justice;

(4) apart from the provisions of section 422 of the Criminal Procedure Code the case fell within the proviso to section 29(1) of the Courts Ordinance to the effect that the Court of Appeal might notwithstanding that it was of the opinion that a point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considered that no substantial miscarriage of justice had occurred.

Cases referred to :—

(1) *Mahbub Singh v. R.* L.R. 72 I.A. 148.

(2) *Waryam Singh v. R.* I.L.R. 22 Lah. 432.

(3) *Bishuwanath v. R.* A.I.R. 1946 All. 153.

(4) *R. v. Thompson* 9 Cr. App. R. 252.

(5) *R. v. Ballysingh* 37 Cr. App. R. 28.